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VIA ECF

The Honorable Sarah L. Cave
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 18A
New York, NY 10007-1312

By **Monday, March 20, 2023**, Defendant Cable News Network shall file under seal the portions of the privilege logs showing the entries that are in dispute.

SO ORDERED 03/17/23

SARAH L. CAVE
United States Magistrate Judge

Re: *Flynn et al v. Cable News Network, Inc.*, No. 1:21-cv-02587-GHW-SLC

Dear Judge Cave:

We represent Defendant Cable News Network (“CNN”), and pursuant to this Court’s order (Dkt. 97), write to detail additional discovery disputes requiring the Court’s attention at the Discovery Conference on March 21, 2023.

Leslie Flynn Facebook Files: On August 11, 2022, CNN told Plaintiffs’ counsel that Leslie Flynn’s Facebook messages were unusable as produced without the corresponding .HTML file. Ms. Flynn nonetheless refused to produce that file. On March 5, 2023, four days before Ms. Flynn’s deposition, third party [REDACTED] produced unquestionably responsive Facebook message with Ms. Flynn about the July 4 video of the Flynn’s at the center of this dispute. Upon receiving it, CNN’s counsel renewed its request for Ms. Flynn to re-download all of her Facebook data, including the proper .HTML files. She still refuses to do so. Therefore, CNN seeks an order compelling Ms. Flynn to produce the necessary .HTML files so that it can review her Facebook messages. CNN reserves its right to reopen her deposition if responsive communications are produced.

Leslie Flynn HIPAA Consent: [REDACTED]

[REDACTED]. Because CNN is of course, “entitled to inquire concerning any comparable psychological or emotional problems that predated the events at issue,” it sought medical records and a HIPAA consent from Ms. Flynn. *See e.g., De Vargas v. United States*, 401 F. Supp. 3d 346, 348 (E.D.N.Y. 2018) (granting motion to compel Plaintiff to sign medical releases because a “Plaintiff may not put her medical condition at issue, lay blame for those conditions or injuries on Defendant, and simultaneously shield some portions of her medical history”); *Suggs v. Capital Cities/ABC, Inc.*, 1989 WL 1143930, at *1 (S.D.N.Y. Dec. 11, 1989) (holding that where plaintiff sought to recover damages for alleged emotional distress “she

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necessarily must be deemed to have waived the psychotherapist-patient privilege with regard to the psychological or emotional problems that she claims were inflicted on her, or aggravated, by defendants”). [REDACTED]

[REDACTED] CNN asked Ms. Flynn to fill out a HIPAA medical release [REDACTED], but Ms. Flynn has refused to sign it. CNN, therefore, seeks an order requiring Ms. Flynn to sign her HIPAA consent form so that CNN may depose her treating medical providers. [REDACTED]

Leslie Flynn Additional Communications: [REDACTED]

[REDACTED] No such messages have been produced. CNN, therefore, seeks an order compelling Ms. Flynn to produce all messages or a certification that she has looked and cannot find them.

Plaintiffs’ Privilege Log Deficiencies: Plaintiffs’ privilege log has numerous deficiencies, rendering it impossible for CNN to discern whether all documents were properly withheld in full. For example, a non-exhaustive list of deficiencies include:

- 1. Communications involving multiple attorneys from different law firms with multiple Flynn family members [REDACTED];**

For each communication involving multiple lawyers from multiple law firms, CNN seeks an order requiring Plaintiffs’ counsel to explain whether there is a joint representation agreement in place as to each attorney and Flynn family member, and if none exist, CNN seeks an order requiring the production of each communication where a waiver of attorney-client privilege has occurred.

- 2. Communications which, based on the subject matter description, appear to at least partially involve business and PR-related advice, not strictly legal advice ([REDACTED]);**

For each communication containing non-privileged information, including but not limited to business or PR advice, CNN seeks an order requiring Plaintiffs’ counsel to instead produce a redacted communication rather than withholding the communication in full.

- 3. Communications with [REDACTED], who, on at least one produced communication, [REDACTED];**

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For each communication involving [REDACTED], CNN seeks an explanation confirming she was formally retained and was acting as an attorney providing legal advice.

4. Vague subject matter column descriptions suggesting that non-privileged material is included, and/or insufficient information is provided to determine whether the communication is privileged [REDACTED];

As but one example, [REDACTED] description is simply “[REDACTED]”, and without more, CNN cannot possibly determine whether this is an attorney-client communication.

5. Communications to non-lawyers, including [REDACTED], thereby waiving any purported attorney-client privilege [REDACTED];

[REDACTED] is a text message thread dated March 17, 2021 between Jack Flynn, his attorney, and [REDACTED] (a non-attorney) and its subject matter involves “[REDACTED]” Any attorney-client privilege appears to have been waived via inclusion of [REDACTED]; therefore, CNN seeks an order compelling the production of those text messages.

6. Communications which do not include a lawyer [REDACTED]; and

[REDACTED] is an email between Joe Flynn and General Flynn without a lawyer dated July 24, 2020. CNN seeks an explanation as to how this communication is covered by attorney work-product. In the event an insufficient response is provided, CNN seeks an order compelling the production of the communication.


7. Communications to lawyers after retaining Plaintiffs’ counsel [REDACTED].

[REDACTED] is an email chain dated March 15, 2021 involving Jack Flynn reaching out to another attorney, [REDACTED], [REDACTED] after he and Ms. Flynn had already signed an engagement letter with their current counsel. CNN seeks an explanation to evaluate whether the communication was properly withheld as privileged.

Pursuant to Local Civil Rule 37.2, counsel for the parties met and conferred on March 9, 2023 in person during Leslie Flynn’s deposition about the first three issues in this letter. Katherine Bolger and Steven Biss participated. During their meet and confer it became clear that the parties had reached an impasse and now seek the Court’s assistance. The parties have agreed to meet and confer on the privilege log issues this Friday.

Respectfully Submitted,

Davis Wright Tremaine LLP


Katherine M. Bolger